1964

State of Utah v. Donald Gene Kazda : Brief of Respondent

Utah Supreme Court

A. Pratt Kesler; Ronald N. Boyce; Attorneys for Respondent;
Donald Gene Kazda; Appellant;

IN THE SUPREME COURT
OF THE
STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

DONALD GENE KAZDA,
Defendant and Appellant.

Case No. 10046.

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Fourth Judicial District Court for Duchesne County
Hon. R. L. Tuckett, Judge

A. PRATT KESLER
Attorney General

RONALD N. BOYCE
Chief Assistant Attorney General

Attorneys for Respondent

DONALD GENE KAZDA,
Box 250
Draper, Utah

Appellant

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STATEMENT OF KIND OF CASE

The appellant has appealed from his conviction of assault with intent to commit murder in violation of 76–30–14, U.C.A. 1953, and robbery, in violation of 76–51–1, U.C.A. 1953, upon jury trial in the Fourth Judicial District Court, Duchesne County.

DISPOSITION IN LOWER COURT

The appellant was brought to trial on the charges from which he now appeals after reversal of his previous conviction by this court. *State v. Kazda,* 14 Utah 2d 266, 382 P.2d 407 (1963). After jury trial, upon which a verdict of guilty was returned, the appellant was committed to the Utah State Penitentiary for the indeterminate terms provided by law.

RELIEF SOUGHT ON APPEAL

The respondent, State of Utah, submits that this court should affirm the appellant's conviction on appeal.

STATEMENT OF FACTS

Respondent submits the following statement of facts as constituting the evidence of the case when viewed in a light most favorable to the jury's verdict. *State v. Ward,* 10 U.2d 34, 347 P.2d 865 (1959).

In the month of February, 1962, the defendant, along with his brother, Dennis, and one Norma Rae Barker, left Salmon, Idaho, travelling south into Utah (R. 8). They arrived in Duchesne, Utah, on the evening of the 20th of February, 1962, at approximately 7:00 P.M. (R. 9). Immediately after leaving Duchesne, the defendant made a statement that he knew of a gas station and grocery store which would be a good place to "hold up" (R. 10). Prior to arriving at Bridgeland, Utah, the defendant took a shotgun from under the seat and a pistol was removed from the glove box of the automobile (R. 10). The defendant, his brother and Mrs. Barker stopped at the combined home, grocery store and service station of Eldon Brady. According to the testimony of Norma Barker, the appellant and his brother put stockings over their heads and entered the store, with the appellant carrying the shotgun. Thereafter she heard a blast and saw a flash. The appellant and his brother returned to the car and the appellant was carrying the shotgun (R. 13, 14). Thereafter, the trio left and as they drove away the appellant stated to Mrs. Barker that the money he obtained was "not much to shoot an old man for" (R.

14). Subsequently, the shotgun was thrown out of the car as was a wallet which was later identified as being that of Eldon Brady (R. 15).

A short time later Sheriff George Marett and others observed Mr. Brady who had been shot in the forearm and the breast by what would appear to be a shotgun (R. 26, 28). Shotgun pellets were found in the area where Mr. Brady was lying (R. 26, 29). Subsequently the shotgun was found in the vicinity of Indian Canyon (R. 35) and Mr. Brady's billfold was found approximately one mile away (R. 46).

A special agent from the Federal Bureau of Investigation testified that he interrogated the appellant in April, 1962, and that the appellant admitted being present at the time of the shooting and the robbery, but contended that he was in the back seat drunk (R. 58).

Sheriff Marett testified that he had endeavored to serve a subpoena on one Johnnie Buck, who had previously testified at the prior trial, and that Johnnie Buck was in the Nebraska State Penitentiary (R. 38–42), and not subject to the jurisdiction of the State of Utah.

Subsequently, over objection, the trial court permitted the testimony received at the previous hearing of Johnnie Buck to be read to the jury. His testimony was to the effect that the appellant, in his presence, had admitted to the holdup at Bridgeland, Utah, and had stated that he had shot an old man with a shotgun (R. 64). The appellant did not testify, but his brother, Dennis, did testify and stated that he, Dennis, did the shooting rather than the appellant, and that his brother had been in the back seat of the motor vehicle drunk at the time.

Mrs. Barker and Dennis Kazda, the brother of the appellant, admitted convictions for the same crime for which

the appellant was being charged. Mrs. Barker stated she had been convicted as an accessory (R. 18).

Based upon the above evidence, the jury returned a finding of guilty.

ARGUMENT

POINT I.

THE APPELLANT CAN CLAIM NO ERROR BASED UPON THE FAILURE OF THE TRIAL COURT TO CONTINUE HIS TRIAL PENDING DISPOSITION OF HIS PETITION FOR AN EXTRAORDINARY WRIT BEFORE THE SUPREME COURT COMPLAINING OF THE TRIAL COURT'S FAILURE TO GRANT THE APPELLANT'S MOTION FOR A CHANGE OF VENUE.

The appellant in Point I of his brief contends that the trial court erred in forcing him to go to trial after overruling his motion for a change of venue while there was pending before the Supreme Court a petition for an extraordinary writ to review the trial court's decision. At the outset it should be observed that the appellant does not contend that the trial court erred in overruling his motion for a change of venue. Indeed, he notes that it is within the sound discretion of the trial court whether or not to grant a motion for a change of venue. This court has on several occasions so ruled. *Winters v. Turner,* 74 Utah 222, 278 Pac. 816 (1929); *Chamblee v. Stocks,* 9 U.2d 342, 344 P.2d 980 (1959); *Anderson v. Johnson,* 1 U.2d 400, 268 P.2d 427 (1954); *State v. Burris,* 388 P.2d 233 (Utah 1964). The appellant's only contention is that the trial court committed error in proceeding merely because there was a petition to the Supreme Court to review the matter. It is submitted that the appellant is in no position to complain. Since he does not on appeal contend that there was an abuse of discretion in denying the change of venue, he cannot complain because the trial court did not continue the matter pending

a ruling from the Supreme Court. He could, had he so desired, have sought review of the question of change of venue by this appeal. Having failed to seek that remedy, in the absence of a contention that the trial court was without jurisdiction, the question of whether the court should or should not have proceeded to trial is moot. There is no question but what the trial court had jurisdiction since there was nothing pending before the Supreme Court but a mere petition for extraordinary writ. No writ had as yet issued nor did the Supreme Court ever issue a writ. Until the Supreme Court assumed jurisdiction of the case, the trial court was within its discretion in proceeding to determine the issues.

In 22A C.J.S., Criminal Law, Sec. 499, p. 166, it is stated:

> "* * * A continuance asked by accused, on the magistrate's overruling his motion for a change of venue, to enable him to apply for mandamus to compel the change, is properly refused, his remedy being by appeal."

See *State v. Barnett,* 98 So. Caro. 422, 82 S.E. 795.

It has been generally recognized that where the granting or a refusal of a motion for a change of venue is within the discretion of the court, the ruling thereon cannot be reviewed by mandamus. Only if the question of a change of venue is ministerial can the remedy of mandamus lie. *Pace v. Wolfe,* 76 Utah 368, 289 Pac. 1102 (1930).

Generally it is recognized that venue may not be reviewed by mandamus, prohibition or certiorari. 56 Am. Jur., Venue, Sec. 75; Annotation 170 ALR 528. See also Witkin, Extraordinary Writs in Criminal Practice, First Criminal Law Seminar (Cohn 1961), where the author observes that there is no need for extraordinary writs in criminal cases in most instances where the appellate remedy is readily available.

It is clear from Utah law that a motion for a change of venue, not based on irregular venue, lies within the sound discretion of the trial court. In these instances it has usually been determined that certiorari or other extraordinary writ will not lie to review the court's discretion, since (1) appeal is available and the order is not as yet final, *State v. Goode,* 4 Ida. 730, 44 Pac. 640; or (2) that the abuse of discretion must be so patent and obvious as to raise no issue of fact. *People v. District Court,* 72 Colo. 525, 211 Pac. 626 (1922). This court has recognized as much in other cases since in *Page v. Commercial National Bank of Salt Lake City,* 38 Utah 440, 112 Pac. 816, the court recognized that certiorari would not lie to review interlocutory orders. Consequently, it is manifest that there is no merit to the appellant's position; first, since the court was not without jurisdiction merely by the filing of a petition for extraordinary writ in the Supreme Court, and could, in its discretion proceed; second, the remedy being sought by the appellant was improper; and, third, appellant can claim no prejudice since he does not in this case contend an abuse of discretion based upon the failure to grant the change of venue.

POINT II.

THE TRIAL COURT COMMITTED NO ERROR IN ALLOWING THE TESTIMONY OF JOHNNIE BUCK, GIVEN AT A PRIOR HEARING, TO BE RECEIVED IN EVIDENCE AT THE APPELLANT'S TRIAL WHERE THE WITNESS WAS CONFINED IN PRISON OUT OF STATE.

The appellant contends that the trial court committed error in receiving the testimony of Johnnie Buck given at his previous trial. It is undisputed that Mr. Buck was not within the State of Utah and in fact was confined in a Nebraska State Prison. Even so, the appellant contends that

an effort should have been made to obtain the presence of Johnnie Buck. The basis of the appellant's contention is that 77–45–12, and 13, U.C.A. 1953, provide a means for the obtaining of witnesses from out of state, and that an effort should have been made to obtain the absent witness by exercising the provisions of these statutes. The cited statutes are the Utah version of the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases. The identical same argument raised by the appellant in this case was raised in the case of *State v. Leggroan,* Utah Supreme Court No. 10004, February 14, 1964. In that case the appellants contended that a primary witness who resided in California should have been secured pursuant to the Uniform Act prior to allowing the testimony of the witness given at preliminary hearing to be read to the jury. This court rejected the argument, noting that the Uniform Act (77–45–12 and 13) is permissive in tenor. The court noted in rejecting the argument similar to that raised by the appellant herein:

> "Perhaps the obvious practical, jurisdictional and possible constitutional problems that might be raised, together with the *permissive* tenor of the Act, have led the courts, wherever the problem has arisen, almost unanimously to conclude that the Act, as to production of witnesses, may be helpful in a given case, permissive in nature, but not mandatory. We think such authorities reflect good reason and logic and we go along with them under the facts of this particular case."

The court relied upon and cited with approval cases from other jurisdictions where a similar ruling had been made. *People v. Serra,* 301 Mich. 124, 3 N.W.2d 35 (1942); *People v. Hunley,* 313 Mich. 688, 21 N.W.2d 923 (1946); *State v. Jordan,* 83 Ariz. 248, 320 P.2d 446 (1958); *People v. Day,* 219 Cal. 562, 27 P.2d 909 (1933).

Consequently, it is apparent that the appellant's argument is foreclosed and without merit. The trial court relied upon the provisions of 77–44–3, U.C.A. 1953, providing the jurisdictional prerequisites for the admissibility of the testimony of absent witnesses. *State v. Vigil,* 123 Utah 495, 260 P.2d 539 (1953). The trial court's reliance was properly placed in view of this court's decision in *State v. Leggroan,* supra. Consequently, there is no merit to the appellant's position.

POINT III.

THERE WAS SUFFICIENT CORROBORATION OF THE TESTIMONY OF THE ACCOMPLICE, NORMA BARKER, TO CONVICT THE DEFENDANT.

The appellant contends that there was insufficient corroborative evidence of the accomplice, Norma Barker, to convict him in view of the provisions of 77–31–18, U.C.A. 1953, prohibiting the conviction of an accused upon the testimony of an accomplice in the absence of some evidence tending to independently corroborate his commission of the crime.

In *State v. Kazda,* 14 U.2d 266, 382 P.2d 407 (1963), this court recognized that evidence virtually identical with that received in the instant case was more than sufficient to corroborate the testimony of Mrs. Barker. The appellant apparently relies for his argument upon the position that the testimony of Johnnie Buck should not have been received in evidence. As can be seen from the argument made in Point II of this brief, there is no merit to the appellant's position, and the admissions made by the appellant to Mr. Buck in and of themselves amply corroborate the testimony of Mrs. Barker. *State v. Erwin,* 101 Utah 365, 120 P.2d 285 (1942); *State v. Vigil,* 123 Utah 495, 260 P.2d 539 (1953).

Consequently, there is no merit to appellant's position on the sufficiency of corroborative evidence.

POINT IV.

THERE WAS SUFFICIENT EVIDENCE BEFORE THE JURY TO CONVICT THE APPELLANT OF THE CRIME OF ASSAULT WITH INTENT TO COMMIT MURDER.

The appellant contends that the evidence before the jury was insufficient to convict him of the crime of assault with intent to commit murder. The basis of the appellant's contention is that there is no evidence sufficient to show his intent. It is a generally recognized rule of law that intent may be presumed from the natural and probable consequences of one's acts. *Dunlap v. United States,* 70 F.2d 35 (7th Circuit 1934); Perkins, Criminal Law (1958), p. 659.

In *State v. Minousis,* 64 Utah 206, 228 Pac. 574 (1924), the appellant was convicted of the crime of assault with intent to commit murder. The facts and circumstances are substantively similar to those in the instant case in that there was no direct evidence of the appellant's intent. In affirming the conviction, this court stated:

> "It is equally well settled that such specific intent may be proved by circumstantial, as well as direct, evidence, and that it may be inferred from the acts and conduct of the accused, the nature of the weapon used by defendant and manner in which it was used, taken together with all the other circumstances in the case. 2 Bishop, New Crim. Proc. § 1101; 3 Bishop, New Crim. Proc. § 661; Michie on Homicide, p. 1343, § 257; Abb. Trial Brief Crim. Cas. 677, 678; Lovett v. State, 9 Ga. App. 232, 70 S.E. 989; State v. Ruck, 194 Mo. 416, 92 S.W. 706, 5 Ann. Cas. 976; People v. Scott, 6 Mich. 287; Chrisman v. State, 54 Ark. 283, 15 S.W. 889, 26 Am. St. Rep. 44; People v. Owens, 3 Cal. App. 750, 86 Pac. 980; State v. Mills, 6 Pennewill, 497, 69 Atl. 841; Crosby v. People, 137 Ill. 325, 27 N.E. 49; People v. Landman, 103 Cal. 577, 37 Pac. 518.
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> "In discussing the question of intent in a case somewhat similar to the one at bar, that eminent jurist, Mr. Justice Campbell, of the

> Supreme Court of Michigan, in the course of his opinion in People v. Scott, supra, said:
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> 'The intent to kill must undoubtedly be established, as an inference of fact, to the satisfaction of the jury; but they may draw that inference, as they draw all other inferences, from any fact in evidence which, to their minds fairly proves its existence. Intentions can only be proved by acts, as juries cannot look into the breast of the criminal.' "

An examination of the facts in this case overwhelmingly demonstrate that there was ample evidence upon which a jury could find beyond a reasonable doubt that the appellant had the intent to commit murder. First, the appellant entered the store of Mr. Eldon Brady armed with a loaded shotgun. Secondly, he admitted firing the shotgun in an effort to accomplish his robbery. Third, immediately after leaving the store he indicated that the money he had obtained wasn't much to "shoot an old man for." Further, in his statements to Johnnie Buck, he stated he just shot "the old son-of-a-bitch and I think I killed him" (R. 64). All of this evidence, coupled with the nature of the shooting, the fact that it was committed deliberately and intentionally in an effort to coerce the victim into relinquishing his property, and that the appellant was of the opinion that he had killed his victim, is clearly sufficient evidence upon which the jury could infer that the appellant intended to murder Mr. Brady.

The evidence before the jury raised a factual issue which they resolved adverse to the appellant. There is no basis to claim error on appeal.

POINT V.

THE TRIAL COURT DID NOT RECEIVE EVIDENCE IMPEACHING THE CHARACTER OF THE ACCUSED IN THE ABSENCE OF THE ACCUSED HAVING PLACED HIS CHARACTER IN ISSUE.

In his final point, the appellant piteously argues that the trial court committed error by allowing testimony adverse to the defendant's character to be received in evidence prior to the time the appellant had placed his character in issue. Once again the appellant bases his argument upon the admission of the testimony of Johnnie Buck and, consequently, the point, as can be seen from what has been said before, is without merit.

As an aside to the issue, the appellant contends that the argument of the prosecutor to the effect that the appellant had shown no compassion or regret for his offense attacked his character. It should be noted that no objection was made to the argument, and that the argument was merely fair comment upon the evidence as it was placed before the jury. There is no merit to the position of the appellant.

CONCLUSION

In *State v. Kazda,* supra, this court reversed the conviction of the appellant for an error not involved in the instant appeal. The issues raised in this appeal are in no way related to those which warranted reversal in the previous case. The evidence overwhelmingly and conclusively proved the appellant's guilt, and the record of proceedings discloses that there was no error of any kind committed.

The appellant has been given more than his day in court, and has been justly convicted. This court should affirm.

Respectfully submitted

A. PRATT KESLER
Attorney General
RONALD N. BOYCE
Chief Assistant Attorney General
Attorneys for Respondent